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4 **UNITED STATES DISTRICT COURT**
5 **SOUTHERN DISTRICT OF CALIFORNIA**
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7 CAROL MURPHY,

8 Plaintiff,

9 vs.

10 CARMEN FULLBRIGHT, in her
11 individual capacity and as trustee of
12 CARMEN FULLBRIGHT TRUST, and
13 COLDWELL BANKER RESIDENTIAL
14 BROKERAGE,

15 Defendants.

Case No. 12-cv-885-JM (WVG)

**ORDER DENYING
DEFENDANT’S MOTION TO
STRIKE AND GRANTING
DEFENDANT’S MOTION TO
DISMISS**

16 Plaintiff Carol Murphy (“Murphy”) filed a first amended complaint (“FAC”) on June 20, 2012 against Carmen Fullbright (“Fullbright”) and Coldwell Banker Residential Mortgage (“Coldwell Banker”) (together “Defendants”). On July 5, 2012, Fullbright submitted a motion to strike under Fed. R. Civ. P. 12(f), and Coldwell Banker filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). For the reasons explained below, defendant Fullbright’s motion to strike is DENIED, and defendant Coldwell Banker’s motion to dismiss is GRANTED with leave to amend.

22 **I. BACKGROUND**

23 Murphy is an individual with psychiatric and physical disabilities who
24 receives rental vouchers issued by the San Diego Housing Commission under the
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1 federal government's Housing Choice Voucher program. Compl. ¶ 4. These rental
2 vouchers are commonly referred to as "Section 8 vouchers." Id. Fullbright is a
3 licensed real estate broker employed by Coldwell Banker. Id. at ¶ 5. Fullbright is
4 also the trustee of the Carmen Fullbright Trust, which owns the Temecula
5 Apartments and other rental properties. Id.

6 On July 21, 2011, Murphy met with the Temecula Apartments' on-site
7 manager. Id. at ¶ 9. After visiting the Temecula Apartments, Murphy asked
8 whether the owner accepted Section 8 vouchers. Id. at ¶ 10. The on-site manager
9 was unsure and told Murphy to speak directly with Fullbright. Id. Murphy called
10 Fullbright to ask if she accepted Section 8 vouchers, and Fullbright responded that
11 she would consider renting to Murphy. Id. at ¶ 12.

12 Around July 27, 2011, Murphy and Fullbright met regarding her rental
13 application at Coldwell Banker's Point Loma office. Id. at 14. At the meeting,
14 Fullbright asked Murphy about her disability. Id. at ¶ 15. Murphy replied that she
15 had anxiety and depression problems along with physical problems. Id. at ¶ 15.
16 Fullbright then declined to rent a Temecula Apartment to Murphy, explaining that
17 she believed most people receiving Section 8 vouchers were disabled and did not
18 want to rent to anyone who had "a mental impairment or emotional problems." Id.
19 at ¶ 17.

20 Murphy alleges that Fullbright's rejection of her rental application for the
21 Temecula Apartments was a violation of the federal Fair Housing Act ("FHA") as
22 well as California's Fair Employment and Housing Act ("FEHA"), Unruh Civil
23 Rights Act ("UCRA"), and Disabled Person's Act ("DPA"). Murphy further
24 alleges that the Defendants were negligent when they violated their duty to operate
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1 the Temecula Apartments without discriminating against disabled persons. Id. at
 2 ¶ 24-47.

3 4 **II. FULLBRIGHT’S MOTION TO STRIKE**

5 **A. Legal Standard**

6 Federal Rule of Civil Procedure 12(f) provides that the court “may strike
 7 from a pleading an insufficient defense or any redundant, immaterial, impertinent,
 8 or scandalous matter.” Fed. R. Civ. P. 12(f). “The function of a 12(f) motion to
 9 strike is to avoid the expenditure of time and money that must arise from litigating
 10 spurious issues by dispensing with those issues prior to trial” Whittlestone,
 11 Inc. V. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010) (quoting Fantasy, Inc.
 12 v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev’d on other grounds 510 U.S.
 13 517 (1994)). “However, striking the pleadings is considered “an extreme
 14 measure,” and Rule 12(f) motions are therefore generally “viewed with disfavor
 15 and infrequently granted.” Stanbury Law Firm v. IRS, 221 F.3d 1059, 1063 (8th
 16 Cir. 2000) (quoting Lunsford v. United States, 570 F.2d 221, 229 (8th Cir. 1977));
 17 see also 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE &
 18 PROCEDURE § 1380 (3d ed. 2010) (“Both because striking a portion of a pleading is
 19 a drastic remedy and because it often is sought by the movant simply as a dilatory
 20 or harassing tactic, numerous judicial decisions make it clear that motions under
 21 Rule 12(f) are viewed with disfavor by the federal courts and are infrequently
 22 granted.” (footnotes omitted)).

1 **B. Discussion**

2 Fullbright brought a motion to strike paragraphs 25(b),¹ 25(d),² 33,³ and 42⁴
 3 from the amended complaint (Doc. No. 13); these paragraphs concern violations
 4 related to the Defendants' alleged refusal to accept Section 8 vouchers. Fullbright
 5 asserts that her refusal to accept Plaintiff's Section 8 voucher presents "a purely
 6 legal issue that the [c]ourt may properly resolve on motion to strike."

7 Fullbright relies heavily on Salute v. Stratford Greens Garden Apartments,
 8 136 F.3d 293 (2d. Cir. 1998), a case in which the Second Circuit upheld the
 9 dismissal of FHA claims brought against an apartment manager who, as a matter of
 10 policy, refused to rent apartments to prospective residents who wished to utilize
 11 Section 8 vouchers. Under the FHA, only reasonable accommodations that do not
 12 cause undue hardship or mandate fundamental changes in a program are required.
 13 Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 301 (2d. Cir. 1998).
 14 The Second Circuit reasoned that economic discrimination resulting from the
 15 refusal to accept Section 8 vouchers was not a reasonable accommodation under
 16 the FHA. Id. at 302.

17 The Ninth Circuit, however, criticized Salute in Giebeler v. M&B Assocs.,
 18 343 F.3d 1143 (9th Cir. 2003), a case which neither party addressed. In Giebeler,
 19 the Ninth Circuit held that the appellant's request for a co-signer, which remedied
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21 ¹ Paragraph 25(b) alleges that the Defendants violated the FHA by establishing a policy against
 22 accepting Section 8 vouchers with discriminatory motive.

23 ² Paragraph 25(d) alleges that the Defendants violated the FHA by failing to make reasonable
 24 accommodations for a disabled person.

25 ³ Paragraph 33 asserts that the Defendants violated the FEHA by establishing a policy against
 accepting Section 8 vouchers with discriminatory motive.

⁴ Paragraph 42 claims that the Defendants violated the DPA by failing to make reasonable
 accommodations for a disabled person.

1 his economic status to qualify as a tenant, was a reasonable accommodation within
 2 the meaning of the FHA. Giebeler, 343 F.3d at 1159. Giebeler noted that the
 3 Supreme Court’s decision in U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002),
 4 rejected the notion that courts “should never get to the reasonableness inquiry
 5 where economic circumstances related to disability are at stake.” Giebeler v.
 6 M&B Assocs., 343 F.3d 1143, 1154 (9th Cir. 2003). Giebeler also noted Judge
 7 Calabresi’s dissent in Salute, which reasoned “that where the individuals in
 8 question are poor because they are disabled, a reasonable adjustment of policies
 9 requiring tenants to qualify on the basis of their own income rather than on the
 10 basis of other financial resources available to them for paying rent is, like allowing
 11 a blind tenant to keep a seeing eye dog despite a rule against pets, an
 12 accommodation of a need created by the disability.” Id. at 1153 (emphasis in
 13 original) (quoting Salute v. Stratford Greens Garden Apartments, 136 F.3d 293,
 14 302 (2d. Cir. 1998) (Calabresi, J., dissenting)).

15 However, another Ninth Circuit decision, Park Vill. Apt. Tenants Ass’n v.
 16 Mortimer Howard Trust, 636 F.3d 1150 (9th Cir. 2011), contains some
 17 contradictory analysis. In Mortimer, the Ninth Circuit upheld a prohibitory
 18 injunction that permitted Section 8 residents to remain in their rental units, but also
 19 overturned the district court’s mandatory injunction requiring the landlord to enter
 20 into Housing Assistance Payment (“HAP”) contracts with the Oakland Housing
 21 Authority because the Plaintiffs failed to show a likelihood of irreparable injury if
 22 the Defendants did not enter into HAP contracts. Park Vill. Apt. Tenants Ass’n v.
 23 Mortimer Howard Trust, 636 F.3d 1150, 1163 (9th Cir. 2011). Mortimer cited
 24 Salute in dicta, noting that congressional intent indicates that the burdens of
 25 Section 8 participation are sufficiently substantial that landlords should not be

1 forced to participate in Section 8. Id. at 1161. Mortimer also noted that once a
 2 landlord accepts a Section 8 tenant, that landlord could no longer turn away other
 3 Section 8 tenants, which could also constitute an unreasonable economic hardship.
 4 Id.

5 Nevertheless, as Giebeler expressly permits the court to look at economic
 6 accommodations under the FHA, a motion to strike is not appropriate to resolve
 7 this dispute even if the economic accommodation may prove to be unreasonable
 8 under the FHA. Cf. RDF Media Ltd. v. Fox Broadcasting Co., 372 F. Supp. 2d
 9 556, 566 (C.D. Cal. 2005) (“Motions to strike are generally disfavored because of
 10 the limited importance of pleadings in federal practice.”). But irrespective of
 11 Giebeler, the disfavored nature of Rule 12(f) motions and the present inability of
 12 the court to determine whether the challenged allegations are “so unrelated to the
 13 plaintiff’s claims as to be unworthy of any consideration as a defense and that their
 14 presence in the pleading throughout the proceeding will be prejudicial to the
 15 moving party,” 5C Wright & Miller § 1380 (3d ed.2004), weigh heavily in favor of
 16 court denying the motion to strike these defenses, without prejudice. Accordingly,
 17 defendant Fullbright’s motion to strike is DENIED.

18 19 **IV. COLDWELL BANKER MOTION TO DISMISS**

20 **A. Legal Standard**

21 For a plaintiff to overcome this 12(b)(6) motion, her complaint must contain
 22 “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. v.
 23 Twombly, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the
 24 plaintiff pleads factual content that allows the court to draw the reasonable
 25 inference that the defendant is liable for the misconduct alleged.” Ashcroft v.

1 Iqbal, 556 U.S. 662, 678 (2009). Factual pleadings merely consistent with a
 2 defendant's liability are insufficient to survive a motion to dismiss because they
 3 only establish that the allegations are possible rather than plausible. Id. at 678-679.
 4 The court should grant 12(b)(6) relief only if the complaint lacks either a
 5 "cognizable legal theory" or facts sufficient to support a cognizable legal theory.
 6 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

7 **B. Discussion**

8 In its motion to dismiss, Coldwell Banker asserts that Murphy's amended
 9 complaint does not contain the requisite factual specificity to assert that it was
 10 vicariously liable because Murphy failed to provide any facts indicating that
 11 Fullbright's conduct was related to her employment with Coldwell Banker.
 12 Coldwell Banker Motion to Dismiss at 4-5. California law holds an employer
 13 vicariously liable for risks broadly undertaken by an employee on behalf of an
 14 employer under the doctrine of respondeat superior.⁵ Jacobus v. Krambo Corp., 78
 15 Cal. App. 4th 1096, 1101 (Cal. Ct. App. 2000); Bailey v. Filco, Inc., 48 Cal. App.
 16 4th 1552, 1558-1559 (1996). An employer is not responsible for an employee's
 17 tortious conduct when the employee is acting outside the scope of employment.
 18 Baptist v. Robinson, 143 Cal. App. 4th 151, 161-162 (Cal. Ct. App. 2006).
 19 Determining whether a tort was committed within the scope of employment is a
 20 question of fact. Id. Federal law similarly applies agency law and vicarious
 21 liability principles to liability under federal statutes. Meyer v. Holley, 537 U.S.
 22 280, 285-286 (2003) ("And the Court has assumed that, when Congress creates a
 23 tort action, it legislates against a legal background of ordinary tort-related vicarious
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25 ⁵ Four of the Plaintiff's five claims are based on California law: FEHA, UCRA, DPA, and Negligence. The fifth claim is based on the FHA.

1 liability rules”); RESTATEMENT (THIRD) OF AGENCY § 2.04 (“An employer is
2 subject to liability for torts committed by employees while acting within the scope
3 of their employment.”). To establish vicarious liability under either state or federal
4 law, Plaintiff must therefore plead facts sufficient to suggest that Fullbright was
5 acting as Coldwell Banker’s employee when she refused to rent a Temecula
6 Apartment to the Plaintiff.

7 Coldwell Banker concedes that Fullbright was its employee at the time of
8 the tortious conduct but asserts that she had no actual authority on behalf of
9 Coldwell Banker regarding the Temecula Apartments. In support of its motion to
10 dismiss, Coldwell Banker submitted a Certified Trust Transfer Deed and a
11 Certified Grant Deed to Carmen Fullbright for the Temecula Apartments.
12 Coldwell Banker therefore stresses that Fullbright’s renting of the Temecula
13 Apartments was for own personal purposes.

14 Murphy, however, believed that Fullbright was acting as Coldwell Banker’s
15 agent regarding the rental of the Temecula Apartments because Fullbright used her
16 Coldwell Banker email address on the Temecula Apartments’ application form and
17 her Coldwell Banker Office to discuss the apartment rental. Compl. ¶ 21.

18 Accordingly, Murphy believed that Fullbright was acting within the scope of her
19 employment with Coldwell Banker and that Coldwell Banker could therefore be
20 held vicariously liable for Fullbright’s allegedly tortious actions. But even if
21 Fullbright was not acting as Coldwell Banker’s agent when renting the Temecula
22 Apartments, Murphy asserts that Coldwell Banker can still be held liable because
23 Murphy had apparent or ostensible authority⁶ on behalf of Coldwell Banker. An
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25 ⁶ Under the California Code, apparent authority is instead referred to as “ostensible authority.”

1 agent has apparent or ostensible authority “when the principal intentionally or by
 2 want of ordinary care, causes a third person to believe another to be his agent who
 3 is not really employed by him.” Cal. Civ. Code § 2300; RESTATEMENT (THIRD) OF
 4 AGENCY § 2.03 (“The power held by an agent or other actor to affect a principal’s
 5 legal relations with third parties when a third party reasonably believes the actor
 6 has authority to act on behalf of the principal and belief is traceable to the
 7 principal’s manifestation.”).


8 However, these facts cited by the Plaintiff are at best only consistent with
 9 the possibility that Fullbright was acting as Coldwell Banker’s actual agent when
 10 renting out the Temecula Apartments. Moreover, Coldwell Banker has submitted
 11 evidenced that Fullbright owned the Temecula Apartments and was acting outside
 12 the scope of her employment and on her own behalf. No factual allegations cited
 13 in the FAC indicate that Coldwell Banker took any affirmative action to represent
 14 Fullbright as its agent for the Temecula Apartments. As Murphy’s complaint is
 15 devoid of any factual allegations that Fullbright was acting within the scope of her
 16 employment with Coldwell Banker or as Coldwell Banker’s affirmative agent,
 17 Coldwell Banker’s motion to dismiss is GRANTED with leave to amend.

18 **V. CONCLUSION**

19 For the reasons stated above, defendant Fullbright’s motion to strike is
 20 DENIED and defendant Coldwell Banker’s motion to dismiss is GRANTED.

21 **IT IS SO ORDERED.**

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 23 DATED: October 4, 2012

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 25 Jeffrey T. Miller
 United States District Judge